IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA LAND RESOURCES, INC., and MARION COUNTY COAL RESOURCES, INC.,

Petitioners,

vs. **No. 21-0845**

AMERICAN BITUMINOUS POWER PARTNERS, LP, WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

AND

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioner,

vs. **Nos. 21-0885, 21-0893**

WEST VIRGINIA LAND RESOURCES, INC., MARION COUNTY COAL RESOURCES, INC., WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

REPLY BRIEF ON BEHALF OF PETITIONERS WEST VIRGINIA LAND RESOURCES, INC. AND MARION COUNTY COAL RESOURCES, INC.

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I. Introduction.

Petitioners West Virginia Land Resources, Inc. ("West Virginia Land") and Marion County Coal Resources, Inc. ("Marion Resources")[1] submit this reply brief to address the response brief submitted by American Bituminous Power Partners, L.P. ("AMBIT") on December 28, 2021 ("AMBIT Response") and the summary response submitted by the West Virginia Department of Environmental Protection ("DEP") on December 30, 2021 ("DEP Response").

The AMBIT Response is difficult to describe. Repetitive, disjointed, tedious, and largely lacking citation to the record are a few appropriate descriptors. As best Petitioners can discern, the 36 pages of text appearing in the AMBIT Response essentially boil down to the following arguments in response to Petitioners' assignments of error: (1) Petitioners lacked standing to challenge the UIC Permit; (2) the Environmental Quality Board ("Board") had discretion to fashion whatever remedy it deemed appropriate for the multiple errors committed by the Department of Environmental Protection ("DEP") even if the chosen remedy allowed the UIC Permit to remain in effect; (3) the Board had discretion to ignore multiple deficiencies in AMBIT's permit renewal application that Petitioners asserted as grounds to vacate the permit; and (4) the Board had discretion to focus on AMBIT's request to increase its injection volume five-fold to the exclusion of everything else that was wrong with the permit application.

What are conspicuously absent from the AMBIT Response are (1) any discussion of the Board's findings of fact and conclusions of law on Petitioners' standing; and (2) any challenge to

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[1] For unknown reasons, AMBIT continues to refer to West Virginia Land and Marion Resources collectively as "Murray." No entity with "Murray" in its name is party to any of the three appeals consolidated for decision before the Court. West Virginia Land and Marion Resources are not affiliates of any company with "Murray" in its name. AMBIT's use of "Murray" also creates confusion because one of the original appellants before the Board, Murray American Energy, Inc., was dismissed after its interests were sold. JA001044 (Final Order at 1, note 2).

the Board's finding that "DEP reissued a UIC permit based upon an application that was not accurate or complete." JA001061 (Final Order at 18). Likewise, AMBIT does not contest the Board's finding that, based on multiple inaccuracies and omissions in AMBIT's permit renewal application, "DEP's approval of the application was therefore arbitrary, capricious, and in violation of the applicable statutory and legal provisions." JA001062 (Final Order at 19). Instead, AMBIT asks this Court to uphold the Board's Final Order if the Court agrees with the Board that Petitioners had standing to challenge the UIC Permit. "AMBIT seeks a reversal of the Board's Final Order on the basis of Murray's lack of standing or, in the alternative, at a minimum, asks that the Court uphold the Final Order as written and already enforced." AMBIT Response at 19. AMBIT attempts to justify the Board's decision to essentially uphold reissuance of the permit with the same injection limits as before by saying the Board had discretion to do so.

As explained below, most of AMBIT's arguments are naked allegations without any citation to the record or legal authority. Several of AMBIT's assertions are directly contrary to the findings made by the Board, which AMBIT has not squarely challenged as "clearly erroneous." Ultimately, AMBIT utterly fails to provide this Court with any rational justification for upholding the Board's decision to allow the UIC Permit to remain in effect without the requested increase in permissible injection volume. There is no such justification because most of the deficiencies acknowledged by the Board (as well as those ignored by the Board) had nothing to do with AMBIT's request for a five-fold increase in allowable injection volume. Had DEP reissued the UIC Permit without raising the injection volume limit, the other errors and omissions that rendered the renewal application inaccurate and incomplete would still exist. In that case, the Board would have no legitimate basis to uphold the permit in the face of the Board's finding that "DEP reissued a UIC permit based upon an application that was not accurate or complete." JA001061 (Final Order

at 18). So it makes no sense for the Board to fashion a remedy that allows the UIC Permit to remain in effect under basically the same terms as the permit previously existed notwithstanding multiple errors that have nothing to do with injection volume.

The DEP Response is at best a half-hearted effort to defend both the Board's decision and DEP's underlying permitting action. The agency unsuccessfully attempts to distinguish the caselaw cited by Petitioners that recognizes vacatur of an improvidently granted permit is an appropriate remedy. DEP also unconvincingly argues that the Board effectively addressed all of Petitioners' grounds for appeal in the Final Order even though the Final Order does not expressly address all of those grounds.

At bottom, neither AMBIT nor DEP offer this Court any tenable grounds to affirm the Board's Final Order.

II. AMBIT's Unsupported, Argumentative, Inaccurate, and Irrelevant Statements in Violation Rule 10 of the West Virginia Rules of Appellate Procedure.

A. Unsupported Statements and Arguments.

Similar to AMBIT's opening brief in support of its pair of appeals, the Response repeatedly advances a number of conclusory statements that lack any citation to the record as required by Rule 10(c)(4) (as made applicable by Rule 10(d)). Additionally, most of what appears in the 15 pages that spans AMBIT's "Response to Statement of the Case" is argument rather than "what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief" as provided in Rule 10(d). In fact, AMBIT does not identify any portions of Petitioners' Statement of the Case that is inaccurate or omits important information. Rather, AMBIT advances a number *arguments* in its purported response to Petitioners' Statement of the Case.

For example, AMBIT contends that the "Board determined that the injection amount was the factor upon which WVDEP's oversight authority was arbitrary and capricious." (Response at 2; no citation). AMBIT claims that the renewal process took place "with the knowledge and input of Murray's environmental compliance personnel pre-approval." (Response at 12; no citation). AMBIT describes Petitioners' appeal as advancing complaints "reflective of the larger Mine Pool system, not anything improper that AMBIT was doing (as its actions were compliant with its existing permit)." (Response at 3; no citation). AMBIT argues that "Murray," the name AMBIT ascribes to Petitioners, "wants to change the Mine Pool system" and "needs and [sic] seeks legislative or regulatory assistance with this burden that cannot now be and has not been available through an administrative challenge of a long-time, lawful permittee." (Response at 5; no citation). Similarly, AMBIT states that "Murray's true issue is the UIC program generally and the management of the Fairmont Mine Pool (responsibility for which Murray voluntarily accepted)." (Response at 4; no citation). AMBIT believes it is so imperative to argue to this Court that Petitioners' purportedly "voluntarily accepted" responsibility for the mine pool that AMBIT repeats that assertion a total of 10 times in its brief. Response, pp. 4, 5, 7, 8, 9, 11, 12, 19 – 20, 27, and 33. Yet AMBIT offers no explanation of why that is relevant to any of Petitioners' assignments of error. As Petitioners will explain in Section IV.B. below addressing Assignment of Error No. 2, AMBIT wholly failed to demonstrate a legal right to inject into mine voids within the Fairmont Mine Pool that are owned or controlled by Petitioners as required by the UIC permitting process.

AMBIT argues that "Murray fails to acknowledge even now that the process before WVDEP and, therefore, before the Board was a third renewal of an UIC permit that had been lawfully in place since 1984." Response, p. 10 (no citation). Again, AMBIT offers no explanation

as to why that is relevant to an evaluation of the accuracy and completeness of the renewal application on which DEP acted and the propriety of DEP's decision to reissue the UIC Permit.

AMBIT also makes repeated conclusory statements about Petitioners' standing in their appeal before the Board. Petitioners address these remarks in Section III below.

B. AMBIT's Inaccurate Assertions That Are Contradicted by the Record.

Aside from AMBIT's allegations and arguments lacking support in the record, several of AMBIT's assertions are directly contrary to findings made by the Board and the evidence presented. Petitioners address only some of the more obvious ones here.

AMBIT contends that it submitted its application for reissuance of the UIC Permit as a "long-time, lawful permittee" that was "performing [its injection operations] as permitted . . . ." AMBIT Response Brief, pp. 5, 7. AMBIT argues that the injection rates in its application for the 2014 permit were meaningless (i.e., it was free to inject as much AMD as it wished under that permit). In support of that position, AMBIT asserts that an unidentified DEP regulation was "changed" sometime after 2014 (when its previous permit was issued), to grant DEP this new enforcement authority over injection volumes. AMBIT Response Brief, p. 2. As shown by the Board's express findings and conclusions, such assertions are without merit.

AMBIT's statement is directly contradicted by the Board's finding that AMBIT's application sought to increase the average and maximum injection volumes (JA001050; Final Order at 7), and that the prior version of the permit established an injection volume limit: "According to Mr. Hudnall [DEP's UIC permit writer], AMBIT's UIC Permit as it existed prior to reissuance in 2020 established limitations on the maximum volume of water that could be injected into the Joanne Mine borehole." JA001058 (Final Order at 15); *see also* Evidentiary

Hearing Tr. p. 293 (DEP UIC Program Manager Bob Hudnall testified that "[B]ased on the annual reports, [AMBIT was] exceeding the *permitted* maximum injection rate" and was "*out of compliance* with their injection rate") (emphasis added). AMBIT does not cite to any prior regulatory provisions that would have established a "report only" condition in the UIC Permit. The Board obviously chose not to give any credence to Mr. Spencer's opinion about how the UIC Permit regulations had purportedly changed over the years.

AMBIT's argument is also contrary to its permit application. The renewal application sought approval to *increase* the permitted injection volume to the actual volume that AMBIT had been injecting in violation of the prior permit. "After several years of observation of the injectate flow, we are requesting that **the approved flow rates be increased to the stated levels.**" JA000090 (emphasis added). If the prior version of the permit did not establish any limit on the injection volume, there would be no reason for AMBIT to seek approval for a higher volume.

The Board also found that AMBIT was violating the prohibition against injection of surface water. "By injecting surface water into the Joanne Mine, AMBIT was in violation of the 2014 version of the UIC Permit at the time it applied for reissuance of the permit." JA001058 (Final Order at 15).

In short, the picture that AMBIT attempts to paint of "an established permittee, who [had] been participating in the UIC program...as envisioned and allowed by West Virginia law" (AMBIT Response Brief, pp. 10-11) finds no support in the record. To the contrary, AMBIT was operating in violation of its existing permit and had been for years.

C. AMBIT's Irrelevant and Unsupported Assertions.

The AMBIT Response reflects statements that are not only irrelevant, but downright strange. These remarks extend into the argument section of the AMBIT Response. AMBIT repeatedly invokes inuendo about Petitioners' motives and suggests some hidden agenda being advanced against AMBIT:

- "[T]he Board seems to join AMBIT and WVDEP in wondering at Murray's interest in pursuing one lawful permittee in a field of dozens." AMBIT Response, p. 8.
- "WVDEP was the alleged subject of the EQB process, not AMBIT, and yet Murray has made and now is making this a vendetta against a lawful permittee." AMBIT Response, p. 14.
- "Murray has an issue and an agenda here that has not been fully explored or revealed at this time[.]" AMBIT Response, p.14.
- "If there were ever any doubt that Murray has an agenda separate and apart from EQB, it bears noting that its brief demonstrates the same." AMBIT Response, p. 23.
- "[I]t becomes more imperative to ask the source of Murray's animus toward AMBIT, where the administrative appeal process that was supposed to be about WVDEP became all about AMBIT's UIC Permit. It is a question worthy of consideration but one that has evaded response to date." AMBIT Response, p. 28.
- "While it bears asking what Murray's motive is in pursuing AMBIT to all ends, nonetheless, Murray received the process it requested and more than it deserved, given its lack of standing." AMBIT Response, p. 32.

- "The instant appeal is based on Murray's estimation that the penalty assessed as against WVDEP (yet felt by AMBIT) was insufficiently severe, that the pound of flesh Murray has sought still evades its grasp." AMBIT Response, p. 17.

Such odd assertions are like those made by conspiracy theorists intent on advancing their cause, especially since AMBIT does not explain what relevance any of these statements have to the propriety of DEP's reissuance of the UIC Permit or the Board's ruling at issue. In any event, Petitioners will not attempt to divine what relevance AMBIT ascribes to these beliefs, and neither should the Court. "Judges are not like pigs, hunting for truffles buried in briefs." *Dep't of Health & Human Res., Child Advocate Office ex rel. Robert Michael B. v. Robert Morris N.*, 195 W. Va. 759, 765, 466 S.E.2d 827, 833 (1995).

In short, the Court should simply disregard most of what AMBIT advances in its "Response to Statement of the Case" as unsupported by citation, argumentative, irrelevant, and contrary to findings by the Board.

III. Standing.

Rather than devote a specific section of its brief to addressing standing, AMBIT litters the Response with repetitive statements about how Petitioners' purportedly lacked standing to appeal the UIC Permit in the first instance. AMBIT Response, pp. 3, 4, 5, 6, 7, 11, 12, 13, 15, 18, 19, 22, 27, 33, 34, 35. Consistent with AMBIT's other arguments, most of these statements lack any citation to the record. AMBIT also pretends that the Board did not make any findings on standing. Like AMBIT's opening brief in its own two appeals, the Response does not once mention, much less challenge, the Board's two and one-half page discussion of why Petitioners established standing to challenge the UIC Permit. JA001059 – 001061 (Final Order at 16 – 18) ("For the

reasons stated below, the Board concludes that Appellants are 'adversely affected' by the AMBIT UIC Permit within the meaning of *W. Va. Code* § 22-11-21 and thus have established standing to pursue the appeal.").

Instead of challenging the Board's ruling on standing, AMBIT makes a number of claims that are directly contrary to the Board's ruling without mentioning that ruling. For example, AMBIT argues that "Murray has no evidence whatsoever of the source of the injectate that arrives [at its treatment plants] and admits that it has done nothing to trace AMBIT's injectate." AMBIT Response, p. 6 (citing the Board's finding that no reliable flow path has been established). Similarly, AMBIT claims that "Even assuming that Murray incurs costs from treating AMBIT's Injectate (which has never been proven)," ACNR agreed to manage the mine pool without any agreement with AMBIT. Response, p. 33 (citing the hearing transcript).

The Board found that a conclusive determination of which direction AMBIT's injectate actually flows does not matter to Petitioners' standing. That is because AMBIT's injectate reaches Petitioners' operations in either flow direction. "Regardless of which way the untreated AMD flows, once AMBIT injects it into the Joanne Mine, either WVLR or MACCR incurs costs to pump and treat the water." JA001053 (Final Order at 10; Finding of Fact ¶31). Undeterred, AMBIT continues to repeat the claim that there is "no evidence" that AMBIT's injectate reaches Petitioner's operations. "No evidence exists that, with AMBIT's performing as permitted, the Joanne Injectate even reaches Murray's treatment facilities[.] Response, p. 7. "Murray cannot and has not traced AMBIT's Injectate and cannot attest that it even leaves the entry mine void." AMBIT Response, pp. 11 – 12 (no citation). These claims are directly contrary to the Board's factual findings on standing, which AMBIT does not challenge as "clearly erroneous." No matter how many times AMBIT repeats this claim, it will not somehow become true.

AMBIT's assertions are also directly contrary to its permit application and testimony by AMBIT representatives. The permit application states that the injectate flows east and is ultimately pumped and treated at the Dogwood Lakes AMD treatment facility. JA000090 (certified record). AMBIT's General Manager, Steve Friend, certified under penalty of perjury that this statement was accurate when he signed AMBIT's application for reissuance of the UIC Permit. JA000105 (certified record). In addition, John Spencer (AMBIT's consultant who prepared the UIC Permit application) and Herbert Thompson (AMBIT's corporate representative) both testified at length about the direction of flow of the injected AMD *into other parts of the Fairmont Mine Pool.* Evidentiary Hearing Tr. pp. 572-577, 676-683. AMBIT's apparent retreat from this position in its briefing before this Court raises serious questions either as to its good faith in repeatedly making these contrary statements now, or about the reliability of its permit application and the credibility of its own witnesses' testimony.

In what appears to be a fall-back position, AMBIT seems to argue that its injection does not materially affect Petitioners' operations, and thus does not cause any injury. According to AMBIT, water flows into the mine pool from other sources and AMBIT's contribution is relatively small. Response, pp. 6 – 7; 19 – 20. Again, AMBIT does not explain how this is relevant. DEP's permit application clearly states that to obtain a UIC Permit, the applicant must demonstrate a legal right to inject into down dip voids, including approval from the mineral owner (i.e., the Petitioners):

> G. Legal Right to Inject
>
> Please present copies of signed and notarized documents showing that, should this permit be issued, applicant has the legal right to inject into the proposed mine void including any[] and all down dip workings likely to receive water from the target void. This document should provide specific approval from the mineral owner to

allow the proposed injection activity to occur. **Without proper documentation, application will be denied.**

JA000101 (emphasis in original). Whether AMBIT injects one gallon or 10,000,000 gallons into the mine pool, the UIC permit application requires AMBIT to demonstrate the legal right to do so or else the permit "will be denied." JA000101. As discussed in section IV.B. below addressing Assignment of Error No. 2, Petitioners' demonstrated to the Board that AMBIT failed to do so. Yet the Board did not acknowledge this deficiency or rule on this ground for appeal in its Final Order. For standing purposes, invasion of a legally protected property right clearly creates an "injury in fact" that gives Petitioner's the right to challenge the UIC Permit. *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 85, 576 S.E.2d 807, 812 (2002) (defining "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical."

For all these reasons, AMBIT has not advanced any valid basis for this Court to find that the Board incorrectly ruled that Petitioners have standing to challenge the UIC Permit. As noted in Petitioner's response brief to AMBIT's opening brief in its two appeals, Petitioners are uniquely situated to establish standing as they own the mine voids into which AMBIT's injectate flows, and their operations are directly impacted by AMBIT's injectate. Response Brief in Appeal Nos. 21-0885 and 21-0893 pp. 17 – 18. If Petitioners lack standing to challenge the UIC Permit, then no member of the public would ever have standing to do so.

IV. AMBIT's Responses to Petitioners' Assignments of Error.

A. Assignment of Error No. 1 (Failure to Vacate the UIC Permit).

Amidst repeated arguments about standing and the alleged absence of any material impact on Petitioners' operations, AMBIT appears to argue that the Board properly upheld the UIC Permit with the original injection volume limits rather than vacate the permit because DEP's decision to increase the volume limits was the only arbitrary and capricious aspect of the permitting decision. AMBIT Response, pp. 21 – 27. Even a cursory review of the Final Order demonstrates that to be patently incorrect. The Board found multiple deficiencies in AMBIT's renewal application and DEP's evaluation of that application:

- "The AMBIT UIC Permit Application did not accurately state the current average rate of injection and the current maximum rate of injection as of the date that the application was submitted." JA001053 (Final Order at 10).
- "The AMBIT UIC Permit Application incorrectly stated that the receiving (target) void for its injection was not up-dip of any other mine voids and incorrectly stated that there was no active mining in the surrounding area." JA001055 (Final Order at 12).
- "The AMBIT UIC Permit Application did not sufficiently establish or identify the flow path of the Injectate form ABMIT's injection operations." JA001055 (Final Order at 12).
- "DEP did not consider AMBIT's non-compliance with the 2014 version of the UIC Permit when deciding to re-issue the permit in 2020." JA001058 (Final Order at 15).

The Board then recognized and ruled that "[t]he DEP may only act on a UIC permit application that is both complete and accurate. Based on the findings set forth above, DEP issued a UIC permit based on an application that was not accurate or complete." JA01061 (citations omitted) (Final Order at 18). Three of these four findings have nothing to do with injection

volume. Moreover, the Board did not even address numerous additional inaccuracies and missing information demonstrated by the evidence presented, which Petitioners' detailed in their opening brief (pp. 20 – 22). These include: (1) failure to accurately describe the material to be injected; (2) absence of documents to establish a legal right to inject into down dip mine voids; (3) inaccurate public notice advertisement; and (4) absence of approval by the U.S. Department of Labor's Mine Safety and Health Administration ("MSHA"). Petitioners' Opening Brief, pp. 20 – 22. These inaccuracies and missing information have nothing to do with injection volumes. Had AMBIT requested renewal of the UIC Permit without any request to increase the injection volume limits, these deficiencies would remain. It would be difficult, if not impossible, to credibly argue that a decision by DEP to renew the UIC Permit in that circumstance would not be arbitrary and capricious. But that is the effect of the Board's decision to simply restore the original volume limits and otherwise uphold reissuance of the UIC Permit that was based on what the Board found to be an inaccurate and incomplete application.

Since the Board found AMBIT's renewal application to be inaccurate and incomplete in multiple ways that have nothing to do with injection volume, the Board's decision to uphold reissuance of the UIC Permit with the original volume limits was arbitrary and capricious.

B. Assignment of Error No. 2 (Board's Failure to Address Multiple Appeal Grounds).

As noted above, the Board's Final Order does not mention, much less resolve, multiple grounds for appeal that Petitioners identified from the certified record and other evidence presented to the Board. AMBIT's response to this assignment of error is frankly perplexing. AMBIT states at the outset that the Board "assembled a full factual record before determining how best to proceed." AMBIT Response, p. 27. Petitioners never disputed that the Board "assembled a full

factual record" before issuing the Final Order. Why AMBIT mentions that is unclear because AMBIT does not go on to explain how that is relevant to whether the Board addressed each ground for appeal that Petitioners' identified based on that "full factual record." Instead, AMBIT lists a page and a half of AMBIT's proposed findings on factual issues that AMBIT claims were disputed during the evidentiary hearing. AMBIT Response, pp. 29 – 30. AMBIT concludes by stating that the "Board is not required to reflect all the facts of importance to Murray, but rather to reflect the facts and conclusions that support its rulings."[2] AMBIT Response, pp. 31 – 32.

Whether intentional or not, AMBIT completely misses the point of Assignment of Error No. 2. Petitioners contend that the Board is required to address, in some fashion, each ground asserted for why the UIC Permit was improvidently issued. In other words, the Board is required to resolve each appeal ground, just like this Court would resolve each assignment of error properly advanced and supported by briefing. By failing to do so, the Board violated (1) *W.Va. Code* § 29A-5-3, requiring that it set forth an "explicit statement of the underlying facts" that support its rulings, and (2) *W.Va. Code* § 22B-1-7(g), requiring that it issue a decision in every appeal only after considering "all the testimony, evidence and record in the case...." This Court has recognized that an administrative agency must "build an accurate and logical bridge between the evidence and the result[.]") *In re Queen*, 196 W.Va. 442, 447, 473 S.E.2d 483, 488 (1996). The Board failed to build such a bridge with respect to multiple grounds for appeal presented by Petitioners.

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[2] This is a rather ironic statement in light of AMBIT's position in its pair of appeals (Nos. 21-0885 and 21-0893) in which AMBIT asserts as assignments of error the Board's failure to describe certain evidence, arguments, and objections advanced by AMBIT. *See, e.g.,* AMBIT's Opening Brief at 1 ("Assignment of Error Number 3: The Final Order is factually flawed and failed to preserve AMBIT's evidence, AMBIT's arguments and objections, and MAEI's admissions against interest."); AMBIT's Opening Brief at 26 ("EQB erred in failing to include AMBIT's evidence, arguments, and objections in the Final Order, even if the Board were then to discount them.").

C. Assignment of Error No. 3 (Treating the Reissuance Application as a Modification Request).

AMBIT appears to argue that Petitioners cannot know why the Board did what it did, and the Board's decision to limit the remedy to reinstating the original injection volume limitations from the prior permit was within the Board's discretion. AMBIT Response, pp. 33 – 35. Petitioners do not claim to know why the Board fashioned the Final Order as it did. What is abundantly clear, however, is that the Board focused only on the increased injection volume limitations in the reissued permit as the remedy for the deficiencies identified from the evidence presented. As noted above, many of those deficiencies have nothing to do with the propriety of a five-fold increase in injection volume alone. For reasons already explained, the Board does not have discretion to simply ignore multiple deficiencies in the permitting process identified from the evidence. If AMBIT had only obtained a modification to an existing permit to increase the volume limits, which modification was successfully challenged before the Board, a remedy that strikes down an approved increase would make sense. That is because DEP regulations clearly provide that a permit modification request does not "re-open" the entire permit. *W.Va. C.S.R.* § 47-13-13.18 ("When a permit is modified, only the conditions subject to modification are reopened.")

Here, however, AMBIT sought permit renewal (actually, "reissuance," in DEP parlance). Under DEP's regulations, AMBIT must demonstrate the same grounds to obtain renewal as if it were applying for a new permit. *See W.Va. C.S.R.* § 47-13-13.12.b (in order to continue injection after the expiration date of an existing permit, the operator must "apply for and obtain a new permit"); JA000087 (Certified Record, p. 53, UIC Permit "Reissuance" application form emphasizes that applicant must provide complete responses to all questions, including all required "detailed and technical information" to allow the DEP to make a "sound permitting decision").

This means that the applicant must demonstrate that it meets *all* the requirements for reissuance of the permit for another term.[3] DEP's review, therefore, extends to all aspects of the existing permit, and is not limited just to aspects that the permittee may seek to have changed in the reissued permit.

AMBIT makes no attempt to address these regulations in its response brief. In fact, AMBIT acts as if they do not exist, much like AMBIT's approach to the Board's standing ruling and other findings. Instead, AMBIT declares (without legal or record citation) that "it is indisputable that the Board's focus on the increased volumes alone is within its authority and discretion, is within the evidence presented, and therefore is beyond this Court's purview."[4] AMBIT Response, p. 34.

Quite the opposite is true. The Board was required to "build an accurate and logical bridge" explaining why all errors the Board did identify in the Final Order, beyond the inaccurate injection volumes, are adequately addressed by allowing the UIC Permit to stand with the same terms and conditions as the prior permit. *In re Queen*, 196 W.Va. 442, 447, 473 S.E.2d 483, 488 (1996). These include (1) the inaccurate claim that the Joanne Mine is not up-dip of other mine voids or active workings (JA001055; Final Order at 12); (2) failure to accurately identify the flow path of the injectate (JA001055; (Final Order at 12); and (3) DEP's failure to consider AMBIT's non-compliance with the 2014 version of the UIC Permit when deciding to re-issue the permit in 2020 (JA001058; Final Order at 15).

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[3] Those requirements are essentially the same ones that apply to the issuance of a new permit for a proposed injection operation that does not yet exist. *See W.Va. C.S.R.* § 47-13-13.12.b.

[4] AMBIT does not explain how or why the Board's decision is purportedly "beyond this Court's purview." This may be another hidden truffle for which the Court need not spend time searching.

When combined with the multiple other errors Petitioners identified (no legal right to inject, deficient public notice; deficient description of injectate; failure to obtain MSHA approval), all of which are independent of injection volume, it becomes clear that DEP never should have reissued the UIC Permit in the first place. Only by treating the renewal application as simply request to modify the injection volumes, which restricts the agency's evaluation to only the merits of the requested change, can the Final Order make any logical sense. Because the renewal was not a modification of the injection volume limits, the Board was obligated to consider the entirety of the renewal process and fashion a remedy that takes into account all the deficiencies identified. The Final Order obviously did not because, as noted, had AMBIT sought and obtained reissuance without a request to increase the volume limitation, all these deficiencies would still exist. Under the Board's logic, DEP's decision would be upheld nonetheless. Such a result would be incongruous to say the least.

V. Reply to DEP's Summary Response.

DEP's Response submitted pursuant to Rule 10(e) presents at most two arguments in opposition to this appeal. Neither of them supports the agency's position.

The DEP first argues that because the federal Administrative Procedures Act, 5 U.S.C. §701, et seq. ("Federal APA") does not expressly allow a reviewing body to modify an appealed permit, Petitioners' reference to *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l. Marine Fisheries Serv.*, 109 F.Supp.3d 1238, 1241 (N.D. Cal. 2015) (holding that "vacatur is the standard remedy" when faced with an unlawful permitting action) was misplaced. As a result, DEP argues that decision is "wholly inapplicable" to this appeal. DEP Response, p. 2.

The holding in *Klamath-Siskiyou Wildlands,* however, was not specifically premised upon the wording of the review provision in the Federal APA. It was instead based upon that court's findings that (like here), the agency's "errors involve more than mere technical or procedural formalities that [the agency] can easily cure." *Klamath-Siskiyou Wildlands*, 109 F.Supp.3d at 1244. Just as the Board in the case *sub judice* determined that the DEP's reissuance of the UIC Permit was "arbitrary, capricious, and in violation of applicable statutory and legal provisions" in multiple substantive ways,[5] the court in *Klamath-Siskiyou Wildlands* held that vacating the federal permit at issue in that case was the only appropriate response to the "seriousness of [the agency's] errors" in granting it. *Klamath-Siskiyou Wildlands*, 109 F.Supp.3d at 1246. *See also Citizens Bank of Weirton v. West Virginia Bd. of Banking and Financial Institutions*, 233 S.E.2d 719, 724 (n.3), 160 W.Va. 220, 226 (W. Va. 1977) ("The Model State Administrative Procedure Act, upon which W.Va. Code, chapter 29A is based, does not differ significantly from the [Federal APA] in its impact on judicial review") (internal citations omitted). When a permit application was so thoroughly deficient and its review so obviously superficial -- as the Board's findings and conclusions reveal with respect to the UIC Permit reissued to AMBIT -- the only appropriate remedy for such errors was to vacate it.[6]

Second, DEP asserts in conclusory fashion that the Board did not err in "summarily addressing immaterial issues" in Petitioners' appeal, because "[I]t is clear from the Final Order that any deficiencies [the Board] believed existed" were "corrected" through the evidence presented at

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[5] JA001059, JA001062 (Final Order at 16, 19).

[6] Without explanation, the DEP notes several times that it has "modified the permit at-issue in a manner consistent with [the Board's] Final Order" that is under appeal. Summary Response, pp. 1, 6, 9. However, the Final Order *itself* modified the AMBIT UIC Permit and did not remand it to DEP for any further action. JA001062 (Final Order at 19). To the extent that DEP means to imply that this Court's hands are now tied because the DEP has taken action of its own and put the Final Order beyond the Court's jurisdiction, Petitioners reject such a claim.

hearing and by the Board's modification of the injection volume limits in the UIC Permit. DEP Response, pp. 4-6. As evidenced by the DEP's inability to explain in any meaningful way *how* it believes these propositions are supported by the Final Order, its position on this issue is without merit.

Petitioners, of course, have not challenged the Board's refusal to address immaterial issues or its failure to "include a ruling on each proposed finding" that they submitted for consideration (DEP Response, p. 4). They have questioned the Board's failure to address – in *any* way -- six (6) specific grounds for appeal that were presented to it in support of Petitioners' request that the UIC Permit be vacated. *See* Petitioners' Brief, pp. 20-24. Despite DEP's effort to gloss over it, this omission does not fall within the rubric of findings that were "not necessary to render a decision" (DEP Response, p. 5); it demonstrates that the Board "entirely failed to address...important aspect[s]" of this case. *In re Queen*, 196 W.Va. at 446, 473 S.E.2d at 487

Moreover, the Board never stated that it was attempting to "correct" deficiencies it found in the UIC Permit application and the DEP's processing of it. Instead, the Final Order conveys the definite impression that the Board was acting on the mistaken assumption that what was pending before it was an appeal of a permit modification, rather than of a permit reissuance. Given its findings and conclusions, it is likely that had it understood the true scope of Petitioners' appeal, the Board would have vacated the UIC Permit and required AMBIT to either try again or make other arrangements to handle its AMD. Since that is the only appropriate relief in these circumstances, the Court should direct that the Board do just that.[7]

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[7] AMBIT asserts that Petitioners' request that the UIC Permit be vacated is an effort to "cripple [its] operations unnecessarily" and "exact punishment on both [DEP] and...AMBIT." AMBIT Response Brief, pp. 27, 32. Yet AMBIT's corporate representative testified that it could build a suitable treatment plant for its AMD for a modest

VI. Conclusion.

Based on the factual findings and legal conclusions set forth in its September 29, 2021 Final Order, the Board's decision to order relief that was limited to a reduction in injection rates in the UIC Permit reissued to AMBIT was either clearly wrong or the result of a clearly unwarranted exercise of discretion on the part of the Board. Nothing raised in either AMBIT's Response Brief or the DEP Summary Response seriously challenges this. In accordance with *W.Va. Code* § 29A-5-4(g) and *W.Va. Code* § 22B-1-7(g)(1), the Final Order should therefore be reversed and this matter should be remanded to the Board with instructions to enter a final order vacating the UIC Permit.

Respectfully submitted,

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capital investment and operate it at an annual cost of $25,000 per year – a fraction of what Petitioners spend to treat AMBIT's water every year. JA001052 (Final Order at 9); Evidentiary Hearing Tr. p. 686.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA LAND RESOURCES, INC., and MARION COUNTY COAL RESOURCES, INC.,

Petitioners,

vs. **No. 21-0845**

AMERICAN BITUMINOUS POWER PARTNERS, LP, WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents

AND

AMERICAN BITUMINOUS POWER PARTNERS, LP,

Petitioner,

vs. **Nos. 21-0885, 21-0893**

WEST VIRGINIA LAND RESOURCES, INC., MARION COUNTY COAL RESOURCES, INC., WEST VIRGINIA DEPT. OF ENVIRONMENTAL PROTECTION, and WEST VIRGINIA ENVIRONMENTAL QUALITY BOARD,

Respondents.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Reply Brief in Appeal No. 21-0845 on behalf of West Virginia Land Resources, Inc. and Marion County Coal Resources, Inc., was served upon counsel of record for all parties and upon the Clerk of the West Virginia Environmental Quality Board on the 12th day of January, 2022 by 1st Class U.S. Mail addressed as follows:

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